SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000297-001 DT 01/08/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA

DENTON A CASEY

v.

RONALD SCOTT KELLY (001)

FREDERICK M AEED

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #1302844

Charge: 1) DUI-LIQUOR/DRUGS/VAPORS/COMBO
2) DUI W/BAC OF .08 OR MORE
3) DRIVE ONE LANE/UNSAFE LANE CHG

DOB: 12/21/68

DOC: 08/18/02

This Court has jurisdiction of this criminal appeal by the State of Arizona pursuant to Article VI, Section 16, of the Arizona Constitution, and A.R.S. Sections 12-124(A) and 13-4032.

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda submitted.

In the case at hand, Officer T.G. Ehrler, of the Phoenix Police Department observed Appellee's (Ronald Scott Kelly) vehicle weave out its lane approximately two feet to the right,

then move abruptly back into its own lane. Officer Ehrler pulled Appellee over and observed that Appellee was intoxicated. Appellee was subsequently charged with violating A.R.S. §§28-729.1, 28-1381(A)(1), and 28-1381(A)(2). Appellee filed a Motion to Suppress/Dismiss in the Phoenix City Court, requesting that the DUI charges [A.R.S. §§28-1381(A)(1) and 28-1381(A)(2)] be dismissed due to a lack of an articulable basis for Officer Ehrler to stop Appellee's vehicle. After an evidentiary hearing, Appellee's Motion to Suppress/Dismiss was granted. Appellant, the State, now brings the mater before this court.

Whether Appellee violated A.R.S. §28-729.1 is not at issue; Appellee admittedly and clearly violated Arizona law when he weaved out of his lane. A.R.S. §28-729.1 states:

> A person shall drive a vehicle as nearly as practicable entirely within a single lane and shall not move the vehicle from that lane until the driver has first ascertained that the movement can be made with safety.

However, Appellee argues that when considering the totality of circumstances, the officer did not have reasonable suspicion that Appellee was engaged in criminal activity. I disagree. Arizona law is quite clear that this officer had the right to stop Appellee's vehicle once he reasonably believed Appellee had committed a traffic violation.[1] In *State v. Ossana*,[2] the defendant was observed speeding and was quickly pulled over by police. The officers then noticed drug paraphernalia in plain view and the defendant was arrested. The Arizona Court of Appeals ruled that the trial court did not abuse its discretion in denying the defendant's motion to suppress the evidence, for the officers "stopped the vehicle for a legitimate reason."[3] The underlying "legitimate reason" in *Ossana* and in the case at hand is public safety. The state has a valid interest in seeing that the roadways remain safe for use by all citizens.[4] The Arizona Court of Appeals further illustrated the state's interest in public safety as it relates to traffic violation stops in *State v. Boudette*[5] :

> The state's legitimate interest in authorizing its agents to stop motorists to issue citations for traffic violations outweighs the minimal intrusion suffered. Citing motorists as they violate traffic laws helps ensure that they will obey the laws and also provides law- enforcement agents with the opportunity to check whether motorists have complied with licensing requirements. This is a

[1] *State v. Ossana*, 199 Ariz. 459, 18 P.3d 1258 (App. 2001); *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).*State v. Boudette*, 164 Ariz. 180, 791 P.2d 1063 (App.1990).
[2] *Id.*
[3] *Id*. at 461, 18 P.3d at 1260.
[4] *State v. Boudette*, 164 Ariz. 180, 185, 791 P.2d 1063, 1068 (App.1990); see also *State v. Powell*, 61 Haw. 316, 603 P.2d 143 (1979).
[5] *Id.*

reasonable exercise of the state's police power.

Not only did the officer have a reasonable suspicion that Appellee violated A.R.S. §28-729.1, and a consequential duty to temporarily remove Appellee from the road for public safety reasons, Appellee's failure to maintain a safe driving pattern (weaving 2 feet into the other lane, then abruptly moving the vehicle back into the correct lane) gave the officer reasonable suspicion to believe that Appellee was driving while impaired. Whether Appellee's weaving gave rise to a reasonable suspicion that Appellee was driving while impaired is the true issue in this case.[6]

Under *Terry v. Ohio*,[7] a police officer with a reasonable and articulable suspicion that a person is involved in criminal activity may make a limited investigatory stop.[8] It is quite reasonable for the officer to infer that Appellee was driving while impaired when: 1) it was 1:00 AM on a Sunday morning (when the bars are legally required to stop selling alcohol); 2) Appellee went 2 feet into the next lane; and 3) Appellee jerked his vehicle back into the proper lane. Thus, the officer was able "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[9] The standard for determining the validity of a *Terry* stop is whether "a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger."[10] Veering two feet into another lane is unquestionably a cue to an observant police officer that a motorist may be impaired by alcohol or drugs.

In deciding whether the officer had a reasonable suspicion that Appellee had violated A.R.S. §28-729.1, or was driving while impaired, a court must, as the Supreme Court has repeatedly instructed lower courts, consider the totality of the circumstances.[11] All relevant factors must be considered in the reasonable suspicion calculus--even those factors that, in a different context, might be entirely innocuous.[12] Considering the totality of circumstances (1:00AM on a Sunday, bar crowds heading home, Appellee's vehicle going two feet into another lane, then quickly jerking back into the proper lane, etc,) a reasonably prudent police officer would be warranted in the belief that his safety or that of others was in danger, and that Appellee had violated A.R.S. §§28-729.1, 28-1381(A)(1), and 28-1381(A)(2). In Appellee's Motion to Suppress[13] he stated:

---

[6] *Diaz v. Arizona Dept. of Transp.*, 918 P.2d 1077 (App. 1996)("the primary responsibility of a police officer in DUI cases is to protect the public by getting drunk driver off the road, arresting the driver for DUI, and serving a license suspension order…").
[7] 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).
[8] *Id.*at 21, 88 S.Ct. at 1879-80.
[9] *Id.*
[10] *Id.* at 27, 88 S.Ct. at 1883.
[11] *United States v. Arvizu,* 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002).
[12] *Id.* at 277-78, 122 S.Ct. 744.
[13] Defendant's Motion to Suppress/Dismiss p. 3, ll. 14-19.

> The Court in *Prouse* condemned random stops of vehicles and that is the situation before this Court. Here, we have a stop solely predicated on the suspicion of the officer. Therefore, the arresting officer had no lawful basis to stop the Defendant's vehicle.

The very case cited by Appellee, *Delaware v. Prouse*,[14] established that police are entitled to stop a car briefly for investigative purposes if they have a reasonable suspicion, based upon specific and articulable facts, that an offense is being or is about to be committed. Here, there was reasonable suspicion that Appellee was driving while impaired.

Appellee cites *State v. Livingston*[15] as mandatory authority on the issue at hand. The facts of the case at hand are quite different and distinguishable from those in *Livingston*. In *Livingston*, the road was:

> …rural, curved, and dangerous, [and the officer] conceded that Livingston … did not weave or engage in any erratic driving. On the stretch of highway in question, only twelve inches of the shoulder is paved. The remaining shoulder is dirt. According to [the officer], Livingston's wheels stayed on the paved portion of the highway at all times, and she did not "jerk [ ]" her vehicle or over-correct after crossing the white line. Torres conceded "there was no other traffic around" and that when Livingston crossed the right-hand line, that deviation had not affected any other traffic[emphasis added].[16]

The Arizona Court of Appeals properly factored the road conditions into the decision:

> The state does not dispute that Livingston otherwise drove safely on a dangerous, curved road apart from her alleged isolated and minor breach of the shoulder line. Under such circumstances, the trial court did not abuse its discretion when it found that Livingston committed no violation and implicitly found that the officer had lacked a reasonable basis for the stop[emphasis added].[17]

[14] 440 U.S. 648, 663, 99 S.Ct. 1391, 1401 (1979).
[15] 206 Ariz. 145, 75 P.3d 1103 (App. 2003).
[16] Id. at 1105.
[17] Id. at 1106.

Here, unlike *Livingston*, the street (Indian School Road) was a straight, safe, well-maintained, major city street. Also, unlike *Livingston*, Appellee *did* erratically and sharply move his vehicle after crossing the line. Again, when considering the totality of the circumstances, the officer had reasonable suspicion that Appellee was driving while impaired.

Appellee also cites *U.S. v. Colin*,[18] which is quite different and distinguishable from the case at hand. Here the court notes that:

> [The officer] observed the car drift onto the solid white fog line on the far side of the right lane and watched the car's wheels travel along the fog line for approximately ten seconds. The Honda then drifted to the left side of the right lane, signaled a lane change, and moved into the left lane. Carmichael next observed the car drift to the left side of the left lane where its left wheels traveled along the solid yellow line for approximately ten seconds. The car then returned to the center of the left lane, signaled a lane change, and moved into the right lane.[19]

In *Colin*, the Ninth Circuit Court of Appeals considered several prior decisions[20] concerning weaving and brief breaches of the pavement lines. However, the court reasoned that "[t]hese cases suggest that to violate a lane straddling statute, a driver must do more than simply touch, even for 10 seconds, a painted line on a highway."[21] The court further reasoned that:

> Even if we assume, as the district court did, that "if the wheels were *on* the line, then that part of the vehicle that extends beyond the wheels was *over* the line and the car was traveling in two lanes," we still conclude that there was not reasonable suspicion to stop Colin for a violation of section 21658(a). Touching a dividing line, even if a small portion of the body of the car veers into a neighboring lane, satisfies the statute's requirement that a driver drive as "*nearly as practical* entirely within a single lane. Because

[18] 314 F.3d 439, 3 Cal. Daily Op. Serv. 12, 2003 Daily Journal D.A.R. 19 , 9th Cir.(Cal.) (2002).
[19] Id. at 441.
[20] *United States v. Guevara-Martinez,* 2000 WL 33593291 (D.Neb. May 26, 2000) (touching, but not crossing, the broken line between two southbound lanes twice in a half mile did not violate the statute's "near as practicable" requirement); *Rowe v. State of Maryland,* 363 Md. 424, 769 A.2d 879, 889 (2001) (concluding that "momentary crossing of the edge line of the roadway and later touching of that line" was not reasonable suspicion to justify traffic stop); *State v. Tarvin,* 972 S.W.2d 910, 912 (1998) (holding that police officer did not have reasonable suspicion to stop the defendant's vehicle where the defendant's car "touch[ed] the right-hand white line").
[21] *Colin*, 314 F.3d at 444.

> the record does not establish how far into the right-hand emergency lane [defendant] drove on any of *three* occasions, there is no basis to state that he was outside the 'practicable' lane. The Honda touched the lines only twice, both times before making safe lane changes. In sum, we conclude that the facts, taken together, support the conclusion that [the officer] lacked probable cause to stop Colin for lane straddling[underlining added, italics mirrored].[22]

The facts of this case support, at the very least, a reasonable suspicion, if not clear probable cause, to believe that Appellee was driving while impaired. Appellee did much more than simply "touch" the marked line on the roadway. Unlike *Colin*, we know how far Appellee traveled into the next lane: two feet. Two feet into the next or oncoming lane could have disastrous results to other traffic on the roadway. The *Colin* court properly stated, "we recognize that in some cases evidence of weaving might be indicative of driving under the influence."[23] In the case before me, when considering the totality of circumstances (Appellee's weaving two feet into the next lane, then abruptly moving the vehicle back into the proper lane), I find that any prudent officer would have found reasonable suspicion that Appellee was driving while impaired. This reasoning is further strengthen by *U.S. v. Fernandez-Castillo*,[24] which held:

> It is perfectly understandable that swerving within one's own lane of traffic would not support reasonable suspicion of smuggling, which has nothing to do with impairment, but that it would support [a] reasonable suspicion that Fernandez was operating a vehicle under the influence of drugs or alcohol [emphasis added].

The trial court erred in granting Appellee's Motion to Suppress/Dismiss.

IT IS THEREFORE ORDERED reversing the decision of the Phoenix City Court.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further, if any, and future proceedings.

---

[22] Id. at 444-45.
[23] *Id.* at 445.
[24] 324 F.3d 1114, 1120, 3 Cal. Daily Op. Serv. 3019, 2003 Daily Journal D.A.R. 3855, 9th Cir.(Mont.)(2003).

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT